A

GSP v TBC

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-1408–09 OF 2023
NANTHA BALAN, MOHD NAZLAN AND AHMAD KAMAL JJCA
21 FEBRUARY 2025

C *Civil Procedure — Contempt of court — Breach of court order — Petitioner-husband (PH) applied to commit respondent-wife (RW) to prison for breaching court order giving him access to child of marriage — Whether RW's actions denying PH of having year-end holiday with child did not, however, warrant custodial sentence in circumstances of case — Whether RM20,000 fine in*
D *default one month's jail was sufficient punishment and deterrent to others to not breach court orders willy-nilly*

The instant appeal by the petitioner-husband ('PH') was against the High Court's dismissal of his application to commit the respondent-wife ('RW') to
E prison for breaching a consent order ('the RCO') with respect to his rights of access to his child from his marriage to RW. PH had listed out a series of alleged breaches committed by RW but the High Court found none of them proven beyond reasonable doubt to warrant sending her to prison. RW, a child psychiatrist with whom the 10-year-old child stayed, denied that she had
F breached the RCO and counter-alleged breaches by PH, eg, that he did not turn up at the mutually-agreed access venue to collect the child or changed the place of venue at the last minute, etc. The allegations raised by PH included his right to have a local or overseas holiday with the child in December 2022. Under paragraph 4.8.2 of the RCO, PH's request to RW for the child's relevant
G documents in order to book the holiday trip had to be made 'within one month prior to the proposed trip'. On 10 December 2022, PH told RW that he wanted to take the child for holidays 'from 24 December 2022' and asked for the information page of the child's passport in order to book the tickets for the trip. RW failed to respond until six days later when she asked for details about
H the trip and its itinerary. Despite PH reminding her that he was not obliged under the RCO to inform her about details of the trip, RW ignored the request for the child's documents, thus causing the planned holiday to be aborted. The High Court held that RW had acted properly as PH had not only failed to make his request one month before the planned trip but also failed to disclose
I details about the trip. In addition, the trial judge took the view that PH was not entitled to holiday access with the child as he was then owing RW RM25,627 in child maintenance payments.

Held, unanimously ordering RW to pay a fine of RM20,000 in default one

month's jail for breaching para 4.8 of the RCO:

(1) Except for the breach of PH's entitlement to holiday access with the child in December 2022 — which was the only issue for consideration in this appeal — the High Court rightly found that none of the other allegations of breach of the RCO had been proven against RW beyond reasonable doubt (see paras 6 & 25).

(2) The High Court judge misinterpreted para 4.8.2 of the RCO as imposing an obligation on PH to make the request for the child's documents one month prior to the proposed holiday trip and also to disclose the details of the trip. The judge further seemed to take the view that PH was disentitled from holiday access to the child as he owed RW RM25,627 in child maintenance payments (see para 12).

(3) The RCO did not require PH to inform RW about the travel date or the return date or details of the proposed holiday trip. He informed RW on 10 December 2022 that the holiday was 'from 24 December'. RW's counsel accepted that PH had made the request 'within' one month prior to the holiday. If the intention was for the request to be made 'one month prior' to the trip, as held by the High Court judge, then the word 'within' should not have been used in para 4.8.2. Further, if the details of the trip had to be disclosed as a condition of the request, then that too should have been specifically and clearly stated in para 4.8.2 of the RCO. Although RW had acted reasonably in wanting to know the details of the trip, such matters, although important in themselves, were not captured in para 4.8.2 of the RCO. And even though PH pointed out that fact to her, RW did not relent and ignored his request, thus denying PH of his holiday with the child (see paras 25–27 & 29).

(4) PH's alleged failure to pay RW RM25,627 in child maintenance was a separate and distinct issue from his entitlement to holiday access with the child and the latter was not conditional on compliance with the former under the RCO. There was no legal basis to disentitle PH from enjoying his holiday, or any access, with the child merely because he allegedly had not complied with his payment obligations under the RCO. These were separate matters and if there was default in any payment, then it was up to RW to take the appropriate steps to ensure compliance (see para 28).

(5) After considering RW's plea in mitigation and taking all facts and circumstances into account, the Court found strong factors in favour of a non-custodial sentence. However, RW's request for a nominal fine could not be entertained as it would only encourage parties to act with impunity and blatantly breach court orders. A fine of RM20,000 in default one month's jail was fair, reasonable and proportionate in the circumstances (see paras 34–35).

[Bahasa Malaysia summary

Rayuan segera oleh pempetisyen-suami ('PH') adalah terhadap penolakan Mahkamah Tinggi terhadap permohonannya untuk memasukkan responden-isteri ('RW') ke penjara kerana melanggar perintah persetujuan ('RCO') berkenaan dengan haknya mendapat akses kepada anaknya daripada perkahwinannya dengan RW. PH telah menyenaraikan beberapa siri dakwaan pelanggaran yang dilakukan oleh RW tetapi Mahkamah Tinggi mendapati tiada satu pun daripadanya terbukti melampaui keraguan munasabah untuk menghantarnya ke penjara. RW, pakar psikiatri kanak-kanak yang tinggal bersama kanak-kanak berusia 10 tahun itu, menafikan bahawa dia telah melanggar RCO dan membuat dakwaan balas pelanggaran oleh PH, contohnya, dia tidak hadir di tempat akses yang dipersetujui bersama untuk mengambil kanak-kanak itu atau menukar tempat tempat itu pada saat-saat akhir, dsb. Dakwaan yang dibangkitkan oleh PH termasuk hak beliau untuk bercuti bersama kanak-kanak sama ada di dalam atau di luar negara pada Disember 2022. Di bawah perenggan 4.8.2 RCO, permintaan PH kepada RW bagi mendapatkan dokumen berkaitan kanak-kanak bagi tujuan menempah percutian hendaklah dibuat 'dalam tempoh satu bulan sebelum tarikh percutian yang dicadangkan'. Pada 10 Disember 2022, PH telah memaklumkan kepada RW bahawa beliau berhasrat untuk membawa kanak-kanak tersebut bercuti 'bermula 24 Disember 2022' dan telah meminta halaman maklumat pasport kanak-kanak itu bagi tujuan tempahan tiket percutian. RW gagal memberikan sebarang maklum balas sehinggalah enam hari kemudian, apabila beliau meminta butiran lanjut berkenaan perjalanan dan jadual percutian tersebut. Walaupun PH mengingatkannya bahawa dia tidak diwajibkan di bawah RCO untuk memaklumkannya mengenai butiran perjalanan, RW tidak mengendahkan permintaan untuk dokumen kanak-kanak itu, sekali gus menyebabkan percutian yang dirancang itu dibatalkan. Mahkamah Tinggi memutuskan RW telah bertindak sewajarnya kerana PH bukan sahaja gagal membuat permintaannya sebulan sebelum perjalanan yang dirancang tetapi juga gagal mendedahkan butiran mengenai perjalanan itu. Di samping itu, hakim perbicaraan mengambil pandangan bahawa PH tidak berhak mendapat akses bercuti bersama kanak-kanak itu kerana dia kemudiannya berhutang RW RM25,627 dalam bayaran nafkah kanak-kanak.

Diputuskan, sebulat suara memerintahkan RW membayar denda RM20,000 jika ingkar penjara sebulan kerana melanggar perenggan 4.8 RCO:

(1) Kecuali pelanggaran hak PH mendapat akses bercuti dengan kanak-kanak itu pada Disember 2022 — yang merupakan satu-satunya isu untuk dipertimbangkan dalam rayuan ini — Mahkamah Tinggi dengan betul mendapati bahawa tiada satu pun dakwaan pelanggaran RCO lain telah dibuktikan terhadap RW melampaui keraguan munasabah (lihat perenggan 6 & 25).

(2) Hakim Mahkamah Tinggi menyalahtafsir perenggan 4.8.2 RCO sebagai mengenakan kewajipan kepada PH untuk membuat permintaan untuk dokumen kanak-kanak itu sebulan sebelum perjalanan percutian yang dicadangkan dan juga untuk mendedahkan butiran perjalanan. Hakim selanjutnya seolah-olah mengambil pandangan bahawa PH tidak berhak mendapat akses bercuti kepada kanak-kanak itu kerana dia berhutang RW RM25,627 dalam bayaran nafkah anak (lihat perenggan 12).

(3) RCO tidak memerlukan PH memaklumkan RW tentang tarikh perjalanan atau tarikh pulang atau butiran perjalanan percutian yang dicadangkan. Beliau memaklumkan RW pada 10 Disember 2022 bahawa cuti itu adalah 'mulai 24 Disember'. Peguam RW menerima bahawa PH telah membuat permintaan itu 'dalam masa' sebulan sebelum cuti. Jika niat adalah untuk permintaan dibuat 'sebulan sebelum' perjalanan, seperti yang diputuskan oleh hakim Mahkamah Tinggi, maka perkataan 'dalam' tidak sepatutnya digunakan dalam perenggan 4.8.2. Selanjutnya, jika butiran perjalanan terpaksa didedahkan sebagai syarat permintaan, maka itu juga sepatutnya dinyatakan secara khusus dan jelas dalam perenggan 4.8.2 RCO. Walaupun RW telah bertindak secara munasabah kerana ingin mengetahui butiran perjalanan itu, perkara sebegitu, walaupun penting kepada mereka, tidak dinyatakan dalam perenggan 4.8.2 RCO. Dan walaupun PH menunjukkan fakta itu kepadanya, RW tidak mengalah dan tidak mengendahkan permintaannya, sekali gus menafikan PH bercuti bersama kanak-kanak itu (lihat perenggan 25–27 & 29).

(4) Kegagalan PH yang didakwa dalam membayar nafkah anak kepada RW sebanyak RM25,627 merupakan isu yang berasingan dan berlainan daripada hak PH untuk mendapatkan akses bercuti bersama anak tersebut dan hak tersebut adalah tidak bersyarat kepada pematuhan kewajipan pembayaran di bawah RCO. Tiada asas perundangan untuk menafikan hak PH menikmati percutian atau sebarang akses kepada anak hanya semata-mata kerana beliau didakwa telah gagal mematuhi kewajipan pembayaran di bawah RCO. Kedua-dua perkara ini adalah berasingan dan sekiranya terdapat keingkaran dalam mana-mana pembayaran, maka adalah menjadi tanggungjawab RW untuk mengambil langkah yang sewajarnya bagi memastikan pematuhan (lihat perenggan 28).

(5) Setelah menimbangkan rayuan mitigasi oleh RW serta mengambil kira semua fakta dan keadaan yang relevan, Mahkamah mendapati terdapat faktor kukuh yang memihak kepada hukuman tanpa pemenjaraan. Namun begitu, permintaan RW agar hanya dikenakan denda nominal tidak dapat diterima memandangkan ia boleh menggalakkan pihak-pihak bertindak sewenang-wenangnya dan secara terang-terangan melanggar perintah mahkamah. Denda sebanyak RM20,000 dengan

A hukuman penjara selama satu bulan sekiranya gagal membayar denda tersebut adalah wajar, munasabah dan seimbang dalam keadaan ini (lihat perenggan 34–35).]

Cases referred to

B *Goh Swee Por v Tee Bee Chin* [2023] MLJU 3306; [2023] CLJU 2956, HC (refd)

Appeal from: *Goh Swee Por v Tee Bee Chin* [2023] MLJU 3306 (High Court, Shah Alam)

C *Nur Izzaida bt Zamani (with Irna Shahana Samsudin and Nur Aqilah bt Azaldin) (CK Ling Izzaida & Irna) for the appellant.*

Chuah Huan Bee (with Tan Su Hua) (Tan Chuah Shuaib & Co) for the respondent.

D

Nantha Balan JCA:

INTRODUCTION

E **[1]** This is an appeal by the petitioner (the husband) against the decision of the learned judge dated 18 August 2023 dismissing his application (encl 51) to commit the respondent (the wife) to prison for being in contempt of the revised consent order of the High Court dated 30 May 2019 in regard to his entitlement to be given access to the child of the marriage. The decision of the F High Court is reported at *Goh Swee Por v Tee Bee Chin* [2023] MLJU 3306; [2023] CLJU 2956 (HC). For reasons of privacy and to spare the child from any embarrassment that may be generated by the vitriolic and vituperative exchange of allegations made by the petitioner and respondent against each other, we have decided to anonymise the names of the parties. For G the purposes of this judgment, we shall refer to the appellant as 'PH' and the respondent as 'RW'. Essentially in dismissing encl 51 the learned judge found that the PH had failed to prove beyond reasonable doubt that the RW was in contempt of court. Further, the learned judge found that in any event, there was inordinate delay on the part of the PH in filing the application for H committal.

PH'S CASE

[2] The PH's case for committal against the RW is as summarised in the I following paragraphs of the learned judge's grounds of judgment. They read as follows:

PH's case

[10] It is the PH's case that the arrangement of guardianship and access of the child

had not been executed satisfactorily and/or had been hindered due to the RW's wilful breach of the court order. In particular the breaches committed by the RW are summarily on the denial of physical and virtual access in the following manner:

– Breach of paras 3.1 and 4.1 of the order of court ie denial of fortnightly weekend day access before the child reaches five years old and denial of fortnightly weekend overnight access after the child reaches five years old;

– 5.2 Breach of paras 3.2 and 4.2 of the order of court ie denial of national public holiday and/or replacement of public holiday access;

– 5.3 Breach of paras 3.3 and 4.3 of the order of court ie denial of the PH's birthday and the child's birthday access and Father's Day access;

– 5.4 Breach of paras 3.4 and 4.4 of the order of court ie denial of Qing Ming festival access;

– 5.5 Breach of paras 3.5 and 4.3 of the order of court ie denial of Chinese New Year access;

– 5.6 Breach of paragraph 4.6 of the Order of Court ie denial of school holiday access;

– 5.7 Breach of para 4.8 of the order of court ie denial of local and/or abroad holiday access;

– 5.8 Breach of para 5 of the order of court ie denial of rescheduling or replacement access;

– 5.9 Breach of para 6 of the order of court ie denial of any additional access;

– 5.10 Breach of para 7 of the order of court ie changing, postponing, manipulating and/or denying of telephone, skype, Facetime, WhatsApp and/or any other electronic manner and/or any other application access;

– 5.11 Breach of para 10 of the order of court ie refusal of dropping off the child at the beginning of the access;

– 5.12 Breach of para 12 of the order of court ie refusal of updating the PH on all important matters in relation to the child.

[11] The PH has complained that the RW has failed, refused and/or omitted to cooperate to adhere to the order. In the year 2020 and 2021 respectively the PH asserted that he had via his former solicitors Messrs Low & Partners issued demand letters to require the RW's compliance to the order of court. However, there was no positive outcome thereon.

[12] Then in the year 2022, the PH via his solicitors Messrs Tam Yuen Hung & Co had issued a notice to show cause pursuant to O 2 r 2B of the Rules of Court 2012 and r 74 of the Divorce and Matrimonial Proceedings Rules 1980 dated 15 July 2022 to the RW personally and to her solicitors. Despite formal demands and reminders, the RW had failed to reciprocate. The PH avers that the RW had deliberately refused to redeem herself and instead had continued to breach the order.

[13] Consequently, the ex parte application for leave to commence committal

proceedings was filed on 22 December 2022 and the order for leave was granted on 8 February 2023.

[14] The PH has contended that the RW's excuse of MCO was invalid as it was actually CMCO or RMCO that was in place.

[15] The RW's excuse that the child refused to meet the PH allegedly due to his violence to the child is untrue, unjustified and not substantiated. The PH urged the court to refer to the WhatsApp conversation between the PH and RW which showed that the child had enjoyed her time with the PH.

[16] Furthermore, it was contended that if indeed the PH was violent and abusive why did the RW not apply to vary the order but instead continue to deny access and right of guardianship of the child at her whims and fancy.

[17] The PH urged the court to find the RW unreliable, untrustworthy and did not have the welfare of the child as the paramount consideration. The PH submitted that the RW had denied the child the accesses and holidays with the PH thereby depriving the child of a good bonding relationship between father and child and this according to him amounted to physical and emotional abuse of the child.

[18] Thus, it was contended that the RW had wilfully refused to comply with the terms of the order and should be committed to imprisonment for disobeying the consent order.

RW'S RESPONSE

[3] The RW denied that she was in breach of the revised consent order. The RW's position maybe gleaned from the following paragraphs of the learned judge's grounds of judgment;

RW's position

[19] It is the RW's position that she had not breached any of the terms of the revised consent order dated 30 May 2019, that she had complied with all the terms of the said consent order. RW averred that she together with the child had turned up at every designated time given for access but unfortunately it was the PW who failed to turn up to fetch the child for access at the mutually agreed access venue. There were also occasions where the PH himself did attend at the agreed designated venue but puzzlingly did not come down from his car to receive or coax the child to go with him.

Fortunately the RW had diligently and meticulously made notes and recorded every detail at each access time and incident. She has exhibited it at Table A in her affidavit in reply (encl 56) which is repeated in her written submissions.

[20] The RW further contended that both she and the PH had agreed that the Subang Jaya police station would be the mutually agreed access venue for pick up of the child and therefore she thought it was unfair for the PH to decide to turn around at the eleventh hour to change the venue to another different location. It caused inconvenience and hardship to her and the child.

[21] In response to the PH's complain that he was denied/refused fortnightly

weekend overnight access to the child since 2 March 2020, it was contended that he was only entitled to overnight access when the child attained the age of five years which was on 2 October 2020 and not on 2 March 2020 as alleged.

[22] In regard to the allegation that the RW had deprived the PH of video call/virtual access or with manipulating the calls, these according to her were mere allegations without any basis and evidence to support it.

[23] Hence it was submitted that since the PH being the applicant in this committal action bears the burden of proof to prove that the RH had deliberately and wilfully breached the said order. It was also argued that the RW had shown valid reasons and justification for all she was accused of and hence she should be given the benefit of doubt as a result of the substantial dispute of facts as adduced through the affidavits of the parties.

HIGH COURT'S FINDINGS

[4] The learned judge's reasons for dismissing the committal application are as stated in the following paragraphs of the grounds of judgment;

Decision of the court

[24] It is settled law that committal proceeding is a criminal or quasi-criminal proceeding as it involves the liberty of the alleged contemnor. It is a very serious matter and the court must proceed carefully before it makes an order to commit to prison.

[25] It does not follow that the granting of leave amounts to a finding of contempt but it is merely what is described as an ex parte vetting process to consider there was a prima facie case of contempt or not (see *Lim Chau Leng v Wong Chee Chong* [2006] 2 MLJ 269; [2006] 1 AMR 151).

[26] In committal proceedings the standard of proof is beyond reasonable doubt (see *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1995] 3 MLJ 549; [1995] 4 CLJ 427). In regard to the burden of proof it shall be on the applicant, ie the PH in the instant case.

[27] The pivotal issue before this court is to decide whether the RW has in fact committed contempt of an alleged breach or disobeyed the consent order dated 30 May 2019 which has attached with it an endorsement of a penal clause under O 45 r 7(4) of the ROC 2012. In a nutshell it is to find whether the evidence presented by the PH is sufficient to attach guilt on the RW for her alleged noncompliance with the terms of the said consent order.

[28] I have earlier on narrated the various alleged breaches and disobedience committed by the RW and will not repeat them here. I have perused the respective affidavits of the parties and the said order of court giving close scrutiny to the reply by the RW as to the allegations made against her. Upon considering and evaluating all the evidence presented on this point, I find that the RW has raised reasonable doubts on all the allegations put by the PH.

[29] In the instant case I made the finding that the PH's allegation of denial of

fortnightly weekend overnight access since 2 March 2020 is without merit and misconceived. The relevant para 4.1 of the said order quite clearly states that the PH is only entitled to overnight access commencing from 2 October 2020 ie when the child attained the age of five years. It is therefore incorrect to state that access would commence from 2 March 2020.

[30] It ought to be noted that the Malaysian government enforced the MCO nationwide beginning on 18 March 2020 in order to curb the rising cases of Covid-19. A nationwide lockdown was imposed encompassing restrictions on inter alia movement, assembly and travel in a bid to curb the spread of the Covid-19 virus. The Government also declared stricter lockdown (EMCO) in specific areas where clusters of Covid-19 cases existed. Many fatalities were reported.

[31] I was persuaded by the argument that the stringent SOPs put in place left it difficult if not almost impossible for the RW to even obtain police approval to have the child ride as a passenger in her car in order to allow for the PH to have access. The child was still very young at that material time. It would have been extremely dangerous for the child to be taken out of the house to fulfil the access as strictly demanded by the PH. The risk of being exposed to the Covid-19 virus was imminent and bearing in mind children were not given vaccinations the RW as a responsible mother was within reason in her decision to keep the child indoors.

[32] The RW has also shown through Table A the record she kept of the number of times access was given to the PH spanning from 21st and 22nd May 2022 to 25 and 26th February 2023. Her meticulous keeping of the records are contemporaneous documents and are admissible and relevant evidence to assist the court in determining the issues at hand. As stated by the learned counsel for the RW and which I might add that I agreed with, the PW himself failed to fetch the child for 29 times when it was his turn for access to the child. I have no quarrel with the learned counsel's astute observation that the PH's own actions amounted to an abuse of the court's process. The PH could not insist on committal proceedings to be taken against the RW when he himself was guilty of not turning up to meet his child.

[33] In regard to the access venue, I find the RH's explanation to be within reason and acceptable. It was mutually agreed that the access venue was to be at the Subang Jaya police station. It has been shown that on 2 July 2022 the PH came to the Subang Jaya police station. However instead of alighting from his car, he decided to WhatsApp the RW asking her to drop the child at the guardhouse of his Mutiara Damansara house. The RW's refusal to do so is understandable as she was already there at the police station waiting for the PH to collect the child. From the information extracted from Table A it has to be acknowledged that prior to 1 January 2021 there were various changes in the access venue which was mutually agreed to by the parties. In any event the changes in venue should not be made an issue of as para 10 of the order of court allowed for parties to substitute or switch access venues as long as it is mutually agreed to by both parties.

[34] I have examined the contents of Table A thoroughly and in my judgement the following conclusions are arrived at:

(i) the PH had exercised Chinese New Year access on 21 and 22 January 2023 at Raia Hotel in Kedah which was the access venue mutually agreed upon

for that year. Thus, the PH's allegation that the RW had breached paras 3.5 and 4.5 of the order of court is untenable and without merit;

(ii) pursuant to para 4.5.1 of the order of court the PH was only entitled to access to the child for Chinese New Year for year 2023 (odd year) on the eve and on the first day of CNY. The PH was in breach of the order of court in insisting that he be given access on the eve, first day and second day of Chinese New Year;

(iii) I do not have any reason to doubt the RW averment that she had given the PH all the replacement accesses, public holidays/special occasions accesses and she listed them as follows:
11 July 2022: Hari Raya Haji;
22 July 2022: PH's birthday;
2 October 2022: the child's birthday;
12 December 2022: Sultan Selangor's birthday;
26 December 2022: Christmas;
18 November 2022: Election day; and
2 January 2023: New Year's day.

(iv) the information recovered from Table A has shown that the PH was never deprived of any video/virtual access to the child.

[35] I acknowledge that the RW is a child-adolescent psychiatrist by profession and she is aware of the harm of alienating a child's mind against the other parent. In any event the PH had been having video/virtual access to the child except that it is not to his satisfaction. Had the child been subjected to parental alienation as alleged, the child would have simply refused to sit in front of the computer for those virtual access. For good measure if there had been parental alienation practised, the child would not have wanted to follow the PH when access was given to him.

[36] I find it believable and even probable when the RW informed the court that ever since the child had learned how to read the clock, he himself would turn off the video call by herself when the virtual access time expired. This is understandable as the child is still young and would rather be playing than having to sit still to talk to a parent. In addition, the RW has submitted that the PH sometimes would not call for virtual access and never bothered to first inform the RW that he was not available leaving both the RW and the child fruitlessly waiting for the PH to come online.

[37] It is to be noted that the PH had failed to particularise his allegation that he was not informed of important matters regarding the child. To this the RW has averred that the PH at all material times had full knowledge of the child's school activities and tuition since the PH was only willing to pay child maintenance if he was duly notified pursuant to para 11 of the order of court. In any event this was a case of the pot calling the kettle black as it was alleged that the PH was a contemnor himself for failing to pay child maintenance which was computed to be in arrears of RM25,627 as at March 2023.

[38] The PH had not provided full and frank disclosure that he too had failed to fulfil his part of the access visits by his failure to turn up. Also and crucially it did not help that his insistence on changing venues complicated matters without trying to

understand the difficulty the RW and the child had to go through in order to accede to his requests.

[39] Likewise, *the court is in agreement with the RW's refusal to handover the child's passport to the PH. The RW was entitled to reject the PH's request when he had failed to comply with para 4.8.2 of the order of court which provided that he must make the request one month prior to the trip and must disclose the holiday itinerary details to the RW. Obviously the PH cannot be allowed to challenge and allege wrongdoing on the part of the RW when he himself was guilty of non compliance and breach of the same said order.*

[40] In this matter the PH's allegations remain as mere allegations without any proof shown of the RW's guilt. Only the relevant facts must be specifically proved. The court cannot accept mere allegations and conjectures. There was no clear proof adduced by the PH to satisfy the required threshold of the burden of proof.

[41] In any event the RW has carefully answered and meticulously explained with precise details and with the help of the contents of Table A all the allegations brought against her. I find her explanation and reasons to be reasonable and valid. I am satisfied with the accuracy of the contents of Table A as it was prepared contemporaneously or as soon as the event occurred. I am satisfied that the RW had taken all steps within her capacity and done all that she could to adhere to the terms of the order of court and to give access to the PH. Perhaps if the PH had been more accommodating and understanding there would have been no need to resort to this committal proceedings. The parties are reminded of the serious impact on the mind of the child and the far reaching adverse consequences the child will be subjected to in a situation such as this where the father is making the application to incarcerate the child's mother. (Emphasis added.)

DELAY

[5] On the issue of delay, the High Court's findings were as follows:

Whether there was a delay in filing the committal proceedings

[46] In this case the PH made allegations that the RW had breached and disobeyed the order of court from the year 2020 up to 2022. Yet this committal proceedings were commenced only in December 2022. The delay is a matter that necessitated the court's attention.

[47] Notably the PH has not explained why he took so long to commence this proceedings. His inaction amounts to acquiescence, waiver and estoppel. He has slept upon his rights and the court will not lend itself nor aid an indolent applicant. The court cannot excuse this unexplained laxity on the part of the PH especially when it is dealing with the liberty of the person charged with the contempt of court. To allow the PH to have his way would be to cause undue prejudice to the RW and to their child.

[48] Accordingly for all the reasons aforesaid I have dismissed the PH's decision with costs.

THE REVISED CONSENT ORDER (HOLIDAY ACCESS)

[6] On the question of the PH's access to the child, the learned judge dealt comprehensively with the PH's allegations and the RW's response, and (*save for the request for holiday access in December 2022*), had concluded (*rightly in our view*) that there was reasonable doubt as to whether the RW had breached the terms of the revised consent order. Thus, we saw no reason to interfere with the learned judge's findings on the issue of access.

DECEMBER 2022 — HOLIDAY ACCESS

[7] We turn now to the issue of the PH's entitlement to holiday access in December 2022. The relevant part of the revised consent order which deals with holiday access is para 4.8 and it reads as follows:

> 4.8 the Petitioner is entitled to bring the Child for local or overseas holidays during his access to the Child as stated in Paragraphs 4.1 to 4.6 above and the sub-paragraphs therein, and Paragraph 6 below:
>
> 4.8.1 for the purpose of Paragraph 4.8 above, the Petitioner shall give the Respondent at least 3 days advance notice to collect the Child's MyKidcard and/or passport valid for travelling (the Child's Identity Documents) from Respondent at a mutually agreed place; the
>
> 4.8.2 the Petitioner's request in Paragraph 4.8.1 above shall be made within one month prior to the proposed trip, save and except where the Child's Identity Documents are required solely for the purpose of visa application, in which case the Child's Identity Documents shall be returned to the Respondent within 3 days of the return of the Child's Identity Documents to the Petitioner by the relevant authorities or travel agents;
>
> 4.8.3 the Petitioner shall return the Child's identity Documents to the Respondent when the Child is returned to the Respondent;
>
> 4.8.4 in the event of default incompliance of Paragraphs 4.8.1 to 4.8.3 above by either party, the party in default shall bear any legal costs, expenses and damage incurred by the affected party in commencing legal proceedings

[8] The PH's request for holiday access in December 2022 was made via WhatsApp messages. The exchange of the WhatsApp messages is clear as to its content and intent. For purposes of the December 2022 holiday access, we have reproduced the following WhatsApp messages which have been extracted from the PH's affidavit affirmed on 20 February 2023 (*for obvious reasons, the child's name has been redacted as XX*):

> 10/12/2022, 17:57 — GSP: I would like to bring XX for holidays from 24 Dec 2022. Pls give me information page of XX's passport so that I can purchase ticket for XX. TQ

16/12/2022, 08:53 — GSP: Pls be reminded to give me the information page of XX's passport so that I can purchase air ticket to bring XX for holidays. TQ

16/12/2022, 10:55 — BCT: Can you provide me with the details of the trip n itinery? Who are going? Where is the venue? And the date? In details.

16/12/2022, 11:15 — GSP: The Consent Order states that u are to cooperate to provide XX's travel document as requested. The Consent Order doesn't require other details as u requested.

16/12/2022, 11:21 — GSP: Pls be reminded to cooperate to provide XX's passport details to me within next 24 hours since it has been about one week since I requested

16/12/2022, 11:32 — GSP: Your delay is causing me unable to purchase the ticket and thus the trip details cannot be finalised and later have to purchase the ticket at higher price.

17/12/2022, 13:00 — GSP: This is a final reminder for u to provide XX's passport details to me immediately so that I can purchase ticket for XX. Failing which u shall be responsible for all costs and damages.

[9] In her affidavit in reply affirmed on 24 March 2023, the RW said (at para 31(b)), '... on 10.12.2022, when the Petitioner asked for the Child's passport from me but he refused to disclose about the holiday itinerary in details (with whom, place of holidays and detailed itinerary), I have to turn him down. At that material time, there was the Tragedy of 'Batang Kali Landslide' whereof the family of the Victim(s) were searching for the whereabouts of those trapped in the Tragedy'.

[10] The PH responded by making the following allegations in his affidavit in reply affirmed on 7 April 2023:

128. For my proposed holidays with the Child in December 2022, the Respondent is dishonest to this Honourable Court. As per the Respondent's solicitor's email dated 23 December 2022, the Respondent unreasonably rejected my holiday request on the ground of insufficient advance notice.

129. However, it was verified that actually my request was compliant to the notice period stipulated in the Order. Therefore, the Respondent then changed to after-thought excuse of Batang Kali tragedy. However, this excuse is also invalid and is merely an after-thought excuse because my request was made on 10 December 2022 which was BEFORE the Batang Kali tragedy. I verily believe that the Respondent had not predicted the Batang Kali tragedy then.

130. Moreover, if I cannot have holidays with the Child simply due to unpredictable Batang Kali tragedy, then how could the Respondent still take a flight with the Child despite air crash tragedies, drive with the Child in a car despite many road accidents, travel cross states with the Child during MCO period, etc.

131. Furthermore, why was the Respondent requiring details of who I would travel

with which has no connection whatsoever to Batang Kali tragedy and, more importantly, not required by the Order.

132. In any case, paragraphs 4.8 and 6 of the Order allows me to bring the Child for local or abroad holidays without requiring the Respondent's approval. In the event of default incompliance, the party in default shall bear any legal costs, expenses and damage incurred by the affected party in commencing legal proceedings.

133. Obviously, the Respondent had again unreasonably rejected my request to bring the Child for holidays, denying the Child of holiday fun time and bonding time with me. In this case, the Respondent has clearly contravened the Order and also shall be liable to bear any legal costs, expenses and damage incurred by me.

THE ARGUMENTS BEFORE US

[11] At the outset of the proceedings, we indicated that save for the request for holiday access in December 2022, we saw no merit in the appeal with respect to the judge's findings on the PH's allegation of denial of access. And, we indicated that we were troubled by the learned judge's findings at para [39] of the grounds of judgment which reads follows:

> [39] Likewise, *the court is in agreement with the RW's refusal to handover the child's passport to the PH. The RW was entitled to reject the PH's request when he had failed to comply with para 4.8.2 of the order of court which provided that he must make the request one month prior to the trip and must disclose the holiday itinerary details to the RW. Obviously the PH cannot be allowed to challenge and allege wrongdoing on the part of the RW when he himself was guilty of non compliance and breach of the same said order*. (Emphasis added.)

[12] Clearly, the judge had interpreted para 4.8.2 of the revised consent order as imposing an obligation on the PH to make the request one month prior to the proposed holiday trip and that he must disclose the holiday details. Lastly, the judge seemed to be of the view that the PH was disentitled from holiday access as he was in default of his obligation to pay child maintenance of about RM25,627.

[13] Counsel for the PH said that the first time PH asked for the child's passport was on 10 December 2022 (at 5.17pm). RW did not reply. So, on 16 December 2022, PH reminded her to give the information page of the passport. She did respond on 16 December 2022 and requested for details of the trip and itinerary. As for the timeline for making the request, counsel for the PH referred us to cl 4.8.2 of the revised consent order which states 'Petitioner's request in para 4.8.1 above shall be made *within one month prior* to the proposed trip ...'. (Emphasis added.)

[14] Counsel for PH also emphasised that it was clear from the PH's WhatsApp sent on 10 December 2022 that the proposed trip was on

24 December 2022, and that the request having been made on 10 December 2022, was within the time-line in para 4.8.2 of the revised consent order which states that the request be made 'within one month prior'. Thus, counsel for the PH said that if the travel date is 24 December 2022, then earliest date for the request should be on 23 November 2022 and the last date would be 23 December 2022. Here the request was made on 10 December 2022 which, according to counsel for the PH, was well within the one month period.

[15] Counsel for the PH referred to para [39] of the grounds of judgment, where the judge said RW was entitled to reject the PH's request under para 4.8.2 which provided that he must make the request one month prior to the trip and must disclose the holiday itinerary details. Counsel said that the judge had misdirected herself as she had missed out the word 'within' one month.

[16] In reply, counsel for the RW said that the proposed trip must bear the date of departure and the date of return. She agreed that the revised consent order does not state that the date of the departure and return must be disclosed. She was referred to PH's WhatsApp on 10 December 2022 at 5.57pm where he stated that 'I would like to bring XX for holidays from 24 December 2022. Please give me information page of XX's passport so that I can purchase ticket for XX. TQ'. Counsel for the RW agreed that based on the WhatsApp, the proposed trip is supposed to take place on 24 December 2022. She also agreed that the request on 10 December 2022 at 5.57pm was in compliance with para 4.8.2 of the revised consent order in the sense that it was made within one month prior to the proposed trip.

[17] According to counsel for the RW, although the PH's request was made 'within' one month, there was nevertheless, non-compliance because no details of the trip were given. And counsel for the RW also emphasised that the judge found that the PH was not entitled to go on holiday with the child because of his own non-compliance with the revised consent order in the sense that he had failed to pay RM25,627 in child maintenance.

[18] Counsel for the RW agreed that in the High Court the RW did not challenge the PH's timeline for the request for holiday access and that in her affidavit affirmed on 24 March 2023 she had expressed her fears by alluding to the Batang Kali tragedy where some children were killed in landslide whilst they were on a holiday (see: para 33(b) of her affidavit).

[19] In justifying the RW's conduct, counsel for the RW referred to para 9 of the revised consent order and said that once child attains seven years old, she has to go to school. Although on 10 December 2022, PH said the holiday starts from 24 December 2022, the RW did not know when the child will return

because on 2 January 2023, the child will be admitted to Standard 1.

[20] In response, counsel for the PH said that the point about the child starting school on 2 January 2023 (Standard 1) was not brought up in the High Court. In so far as the issue of the RW's purported concerns about the child's safety whilst on holiday, counsel for the PH said that the RW only raised the concern about the Batang Kali tragedy in her affidavit, and not in the WhatsApp.

[21] This court posed the following question to counsel for the RW since the request for passport information on 10 December 2022 was made by the appellant within time as stipulated in para 4.8.2 of the revised consent order, and since the said order is silent and does not state that the PH is to disclose any details of the proposed holiday, was the RW in breach of the said order by refusing to give the passport details unless PH gave the holiday details?

[22] Counsel for the RW replied as follows. She said:

(a) RW was not in breach of the revised consent order because, para 4.8.2 — within one month prior to the proposed trip — it does not have a travel date and return date. Merely said 'from 24 December 2022'. Child was seven years old (para 9 of the order). Respondent/wife is concerned for safety and whereabouts of the child. She had fears for the child's safety (Batang Kali incident) why is so difficult for the appellant to say the date of travel and date of return?;

(b) why is so difficult for PH to say where he was taking the child? In the WhatsApp, RW did not say anything about Batang Kali or the fact that the child starts school on 2 January 2023;

(c) 16 December 2022 at 10.55am, she asked, 'Can you provide me with the details of the trip itinerary? Who are going? Where is the venue? And the date? In details'; and

(d) in 2019, when he took the child on holiday, he mentioned the date of travel and return but he did not give the details.

[23] When pressed on the point about the terms of the revised consent order, counsel for the RW candidly agreed that the revised consent order is silent on 'details of holiday' and the PH is not required to provide details.

[24] Counsel for the PH said that there was no wilful refusal to give the travel date details and holiday destination etc. In amplification, it was contended for the PH that in referring to para 39 of the grounds of judgment, the judge was wrong because the revised consent order did not impose an obligation on the PH to disclose the details of the proposed holiday. And the judge missed out

A the word 'within' one month which appear in para 4.8.2 of the revised consent order.

OUR DECISION

B **[25]** As far as we are concerned, there is really only one issue in this appeal which needs to be considered and it relates to the PH's right to have holiday access with the child. It is clear that on 10 December 2022, the PH sent a message via WhatsApp to the RW and asked for the information page of the child's passport so that he could purchase the tickets for the upcoming trip. In C his WhatsApp, he said 'holiday from 24 December'. It is clear that he intended to start the holiday on 24 December. Of course, he did not mention the return date. We note that the revised consent order is silent on the obligation to disclose the travel date or return date.

D

[26] Be that as it may, the questions that arise are whether the PH's request was made within one month prior to the holiday, and whether the PH must disclose the details of the holiday. In this regard, para [39] of the grounds of judgment seems to imply that the PH did not make the request in time because E the judge whilst referring to para 4.8.2, did not use the word 'within'. Before us, counsel for the RW accepted that the PH did make the request 'within' one month prior to the holiday as the proposed holiday was on 24 December and his request was on 10 December 2022. There is nothing unclear about the date when the holiday is to start. It was supposed to start on 24 December but F nothing could be done for the holiday access to materialise as the RW refused to give the information page of the passport. With that, the proposed holiday trip just evaporated.

[27] The other pertinent issue is the demand by the RW for the details of the G proposed trip. In para 39 of the grounds of judgment, the judge said that the PH was not entitled to holiday access as he had not given details of the proposed trip. Looking at para 4.8.2, it is clear and unambiguous that there is no obligation on the PH's part to give the holiday details. Of course, as a parent, the RW was acting reasonably in wanting to know all the relevant H details ie destination, who else where travelling etc. But these matters, although important in themselves, were not captured in para 4.8.2 of the revised consent order. And, even after she was told by the PH on 16 December 2022 that he was not obliged to give the details, the RW did not relent. The RW just ignored the PH's request for the information page of the child's passport and the PH I was therefore denied his holiday access with the child.

[28] In so far, the PH's alleged failure to pay RM25,627 as child maintenance, we take the view that the PH's default (if any) is separate and distinct from his entitlement to holiday access and the latter is not conditional

on compliance with the former, unless the order of the court specifically makes it conditional. We would add that there is no legal basis to disentitle the PH from enjoying his holiday or any access with the child merely because of his (alleged) non-compliance with payment obligations under the revised consent order. These are separate matters and if there is default in any payment, then it is up to the RW to take the appropriate steps to ensure compliance.

[29] For completeness, we should mention that the phrase, 'within one month prior to the proposed trip' is self-evidently, badly worded and if the intention was for the request to be made 'one month prior' to the proposed trip then the word 'within' should not appear in that paragraph. Further, if the details of the holiday trip are to be disclosed as a condition of the request, then that too should have been specifically and clearly stated in para 4.8.2 of the revised consent order.

BREACH OF THE REVISED CONSENT ORDER

[30] In our view, in refusing to give the passport information page to the PH, there was a clear breach by the RW of para 4.8.2 of the revised consent order. The High Court fell into error in holding that there was no breach of the revised consent order by the RW in relation to the issue of the holiday access in December 2022. We therefore allow the appeal and set aside the High Court's order dated 18 August 2023 and hold the RW to be in contempt of the court vis a vis para 4.8.2 of the revised consent order.

MITIGATION

[31] We then heard the RW's plea in mitigation. The RW said that the PH stills owed her arrears of school fees of around RM25,000. From the cause papers we gather that there is a sum of RM 25,627 which is still due and owing by the PH as child maintenance. She said that when she asked PH to disclose the details of the proposed trip, she was acting in the best interest of the child. According to the RW, she had no intention of preventing the PH from having holiday access with the child and that she just wanted the details for her own peace of mind, bearing in mind the landslide incident in Batang Kali occurred on 16 December 2022 and some children were killed in that incident.

[32] Hence, she was worried for her child's safety. The RW apologised for the breach of the revised consent order. She emphasised that she had no intention to breach the revised consent order. She implored upon us not impose any custodial sentence as she has to look after the child, who is now ten years old and was staying with her. She also emphasised the she was a medical professional (child psychiatrist) and that any custodial sentence would affect her personally and professionally. Counsel emphasised that the PH still owes

RW RM25,627. She prayed that there be no custodial sentence and for a nominal fine of RM1,000 to be imposed.

[33] On the other hand, counsel for the PH said that on the issue of purported unpaid maintenance, it is a non-issue before this court. If anything remains unpaid, RW should take action. Counsel said that the RW knows of the terms of the revised consent order. RW has no right to refuse to give the passport despite him not giving travel details. According to counsel for the PH, the RW was persistent in breaching the revised consent order. The Batang Kali incident was not in her WhatsApp messages but was only raised in affidavit. It is clearly an 'afterthought' because she did not raise it in her WhatsApp. The Batang Kali incident did not operate in her mind. She should be sent to jail because of her persistency.

DECISION — PUNISHMENT FOR CONTEMPT

[34] Taking into account all facts and circumstances of the case and the RW's plea in mitigation and the submissions of counsel, we are of the view that there are strong factors in favour of a non-custodial sentence. However, we disagree that a fine should only be nominal. A nominal fine would make a mockery of court orders and would only encourage parties to act with impunity and blatantly breach court orders.

FINE

[35] Our decision is that the RW is to be imposed with a fine for being in breach of the revised consent order. Accordingly, we imposed a fine of RM20,000 which we thought was fair, reasonable and proportionate ('the fine'). The fine is to be paid on or before 4pm on 21 March 2025, failing which the RW will be imprisoned for a period of one month. We directed the Court of Appeal Registry to monitor whether the fine has been paid and for a warrant of committal to be issued on 24 March 2025, if the fine is not paid by 21 March 2025 (4pm).

COSTS

[36] We order the RW to pay costs of RM10,000 (subject to allocator) as costs here and below. The sum of RM1,500 which has already been paid by the PH to the RW is to be refunded by the RW to the PH.

RW to pay a fine of RM20,000 in default one month's jail for breaching para 4.8 of the RCO.

Reported by Ashok Kumar